

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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MATTHEW RAYMOND,

Plaintiff,

vs.

18-CV-1467

TROY MITCHELL, et al.,

Defendants.

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Transcript of a Telephone Conference held on
June 3, 2020, the HONORABLE ANDREW T. BAXTER, United
States District Judge, Presiding.

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1 (The Court and Counsel all present by
2 telephone, 2:00 p.m.)

3 THE COURT: All right, good afternoon, this is
4 Judge Baxter. This is Raymond versus Mitchell, 9:18-CV-1467.
5 Do we have counsel for plaintiff on the line?

6 MS. FREEMAN: Yes, your Honor, good afternoon, this
7 is Emma Freeman for the plaintiff Matthew Raymond.

8 THE COURT: All right. Do we have counsel for the
9 Auburn defendants?

10 MR. MACKEY: Good afternoon, your Honor, Patrick
11 Mackey with Lipsitz, Green on behalf of all defendants except
12 defendant Hoppins.

13 THE COURT: All right.

14 MS. BUTH: Good afternoon, Judge Baxter, Cheryl
15 Meyers Buth for defendant Hoppins.

16 MS. ROSENFELD: And your Honor, good afternoon, I
17 just wanted you to know that this is Katie Rosenfeld also for
18 plaintiff along with Emma Freeman.

19 THE COURT: Okay. And although she was still
20 listed on the docket as the attorney for the John Doe
21 defendant, we advised Ms. Cowan that she doesn't need to be
22 on the line since I think, because of her conflict, she
23 wouldn't be able to stay in even if the John Doe is
24 identified.

25 So ten months ago, plaintiff's counsel filed a

1 letter motion regarding a number of discovery disputes they
2 had with defense counsel -- did somebody just join us?

3 MS. PERRI ROBERTS: Diane Perri Roberts from
4 Lipsitz, Green, Scime, Cambria.

5 THE COURT: All right, so we've got -- are you
6 waiting for Mr. Nelson Covert, Barry Nelson Covert or not?

7 MS. PERRI ROBERTS: No, Barry is not going to be on
8 the call, Pat Mackey should be on the call already, though, I
9 think.

10 THE COURT: He is.

11 MS. COWAN: I'm here, also.

12 THE COURT: Oh, all right, do you want to stay on,
13 or --

14 MS. COWAN: Nicole left it up to me, she said
15 because the John Doe is still on the docket I guess, that I
16 could listen in if I wanted to, so I'm here.

17 THE COURT: I suppose in theory your conflict might
18 not disqualify you from John Doe since you wouldn't have had
19 any communications with him but you've had communications
20 with other counsel, so anyway, I'll leave it up to you, if
21 you want to stay on, I'll leave it up to you.

22 MS. COWAN: Okay, thanks, your Honor.

23 THE COURT: Okay. So ten months ago plaintiff's
24 counsel filed a letter motion regarding a number of discovery
25 disputes that they had with defense counsel who at that time

1 was Ms. Cowan. The letter motion is Docket Number 24.

2 Because of a conflict of interest that developed on
3 the part of the AG's office, all of the defendants
4 subsequently were appointed new counsel in November and
5 December of last year, and I asked them to respond to
6 plaintiff's issues regarding discovery.

7 After a continuance because of logistical problems
8 related to the COVID-19 epidemic, counsel for all of the
9 defendants other than Ms. Hoppins filed a letter brief in
10 response to plaintiff's letter motion to compel, which is
11 Docket Number 70. Ms. Buth, is defendant Hoppins joining in
12 the position of the other defendants on this, or are you
13 going to ask to be heard separately on that?

14 MS. BUTH: Your Honor, I didn't file a letter
15 because I didn't think the disputes pertained to my client,
16 she was a nurse at the facility, not an officer, and if
17 Ms. Freeman or, you know, other plaintiff's counsel, you
18 know, and I can't work -- can't work out her previous
19 request, then you know, we can, I assume, come back to your
20 Honor, but I don't see that as applying to my client so I
21 didn't file a letter motion.

22 THE COURT: Okay, fair enough. Bear with me, I'm
23 just jotting a note here. Okay. So the defendants,
24 presumably after consultation with DOCCS, have agreed to
25 provide some discovery that was previously withheld, so it

1 looks like the scope of the discovery dispute has been
2 somewhat reduced. The goal today is to try to address the
3 remaining discovery disputes and hopefully get the litigation
4 back on track here.

5 So is there any new information that has come to
6 light after the defense response or any change in the
7 plaintiff's position following the receipt of the defense
8 response that we should talk about before I dive in here?

9 MS. FREEMAN: Yes, your Honor, this is Emma Freeman
10 for Matthew Raymond, the plaintiff. Nothing major has
11 changed factually, but I do think that it would be useful to
12 talk through some of the remaining categories of documents,
13 because certainly we're willing to compromise where it's
14 reasonable and aren't just going to hold the line set forth
15 in our letter as a matter of course. So if the court's
16 amenable, I would like to make a few comments about the
17 specific categories of documents still at issue.

18 THE COURT: Okay. Go ahead.

19 MS. FREEMAN: Thank you. So first I'd like to
20 address the personnel file, specifically of defendant
21 Mitchell, and I think as a useful framing device, I want to
22 remind the court that this is not a typical use of force or
23 excessive force case. Defendant Mitchell is really an
24 exceptional defendant. Since 2002, before discovery, we are
25 already aware of seven lawsuits other than this one making

1 allegations of mostly excessive force and in one case sexual
2 harassment and the fact patterns in some of those cases, as
3 far as we can discern, are in some cases startlingly similar
4 to the ones here. At least two other inmates have sued
5 defendant Mitchell for assault specifically around their
6 genital area. They've experienced punching and kicking in
7 the groin, anus, and testicles just as Mr. Mitchell did, and
8 even the sexual harassment trial, which defendants claim is
9 irrelevant, contain testimony which we just disclosed with
10 Mr. Mitchell's fixation with penises and inmates' penis size.
11 This is a man who is a known predator, who has a pattern of
12 behavior and a pattern of abuse of inmates. So in discussing
13 some of these disclosure issues, you know, we would ask the
14 court to keep in mind this really is an exceptional scenario
15 with exceptional facts.

16 So with respect to defendant Mitchell's personnel
17 file, of course we're not seeking personal information, you
18 know, relating to his banking information or his family or
19 anything of the like and I'm certain that we can work with
20 defense counsel on the boundaries of that kind of personal
21 information. But performance evaluations are clearly
22 relevant to the case here, which contains, among other
23 things, a claim for negligent retention when you have an
24 abuser like defendant Mitchell who has been beating inmates
25 since 2002 and likely before that, performance evaluations

1 are certainly part of the broad scope of discovery we're
2 entitled to.

3 And I would say the same, your Honor, respecting
4 documents relating to defendant Mitchell's suspension. I
5 don't believe this is contained in the letter but in
6 defendants' document responses and objections, they seem to
7 indicate that the -- the suspension wasn't related to the
8 incident alleged in the complaint and therefore isn't
9 relevant. We don't agree with that, your Honor. Lieutenant
10 Mitchell was suspended without pay after a hoard of lawsuits
11 were filed against him. We are entitled to know the basis of
12 that suspension, partly because of the pattern of behavior
13 that we've alleged.

14 And lastly, your Honor, I'd like to turn to prior
15 complaints and charges of misconduct against Lieutenant
16 Mitchell as well as use-of-force incidents which we see as
17 related. Even if prior complaints and charges of misconduct
18 don't specifically contain excessive force allegations, we
19 are entitled to them. There's a lot of evidence, as I set
20 forth for the court, that Lieutenant Mitchell continuously
21 engages in sexually abusive and bullying misconduct, whether
22 or not it involves excessive force. And under, you know, the
23 Federal Rules of Evidence 404(b)(2), this evidence can be
24 admissible at trial which of course isn't a criteria for
25 discoverability, but we intend to use that evidence at trial

1 should the case proceed that far, to show that defendant
2 Mitchell has a pattern in terms of the way he abuses the
3 inmates that are purportedly in his care.

4 And as for the use-of-force incidents, your Honor,
5 it seems that the defendants' only objection to disclosing
6 use-of-force records for defendant Mitchell is based on the
7 way that the records are maintained, and I understand from
8 his letter that they are not indexed by officer but only by
9 inmate. I think clarification from the defendants on this
10 point would be useful. You know, our understanding from
11 other litigation, including a 2019 Third Department case, is
12 that those documents have previously been withheld by DOCCS
13 on the basis of state privilege because they were ostensibly
14 produced in order to facilitate employee evaluations. And if
15 that's true, your Honor, it can't be the case that they are
16 not accessible by officer; otherwise, how could they be used
17 for performance evaluation purposes? And in any case, you
18 know, even if there were, even if the records are in fact
19 maintained as the defendants say, because of the exceptional
20 nature of defendant Mitchell, if ever there were a case where
21 some additional burden were appropriate during discovery
22 phase, we submit, your Honor, that this case is it. This is
23 beyond a bad apple. This is truly a predator. And we need
24 to understand why he was able to maintain his employment at
25 DOCCS so long such that he was there long enough to abuse and

1 harm Mr. Raymond. So I'd be happy, your Honor, to speak to
2 any specific points that you have questions about, but those
3 are the preliminary points I wanted to make.

4 THE COURT: All right. Let me ask a few questions
5 and then I'll give defendants a chance to respond, I wasn't
6 necessarily going to start with argument, but that's okay.
7 So the -- I guess my sense from reading some of the papers,
8 and I'm obviously not as deeply into this as the lawyers, was
9 that some of the prior sexual harassment incidents or
10 allegations involved staff as opposed to inmates. Am I wrong
11 about that?

12 MR. MACKEY: Your Honor, this is Patrick Mackey on
13 behalf of Officer Mitchell. The -- assuming we're all
14 talking about the same claim, it was a sexual harassment
15 claim by a fellow employee, and it was pretty far back.
16 We're talking about 2006, 2007, where these charges were
17 levied and at the end of the day, those charges were
18 dismissed against Officer Mitchell. So we're talking about
19 charges not related to use of force, we're talking about
20 charges that happened over 10 years ago, and we're talking
21 about charges that were ultimately dismissed against Officer
22 Mitchell so I think there's a lot of reasons why anything
23 related to those particular, that particular claim really
24 isn't discoverable, at this point.

25 MS. FREEMAN: Your Honor, I'd respond only that as

1 I said, we've disclosed a good deal of testimony from that
2 trial that happened in 2012 that buttresses our claim of
3 defendant Mitchell's engagement in a pattern of abuse. And
4 that specifically is the fixation with penises and penis
5 size. A good amount of Lieutenant Mitchell's typical abuse
6 is genitalia focused, and for that reason, the Penny Collins
7 trial is relevant and it's certainly discoverable. The rules
8 of civil procedure are very broad in terms of what's
9 discoverable.

10 THE COURT: And what do we know, Mr. Mackey, about
11 the reasons for the suspension of this particular defendant
12 Mitchell?

13 MR. MACKEY: Your Honor, with respect to Officer
14 Mitchell's suspension, from what we've gathered so far is
15 that the suspension is related to a matter that happened
16 after the allegations in this case. In this case plaintiff
17 Raymond is alleging that there was use of excessive force on
18 September 14th of 2016. What we've been able to decipher so
19 far is that any suspension related to Officer Mitchell
20 happened after September 14th of 2016.

21 I do want to let your Honor know that we're
22 still -- this is something we're still digging into. I have
23 further requests into DOCCS and the Labor Relations Bureau
24 for more information regarding suspension, so unfortunately I
25 guess we can say we have incomplete information so far, but

1 you know, if we get more information regarding the suspension
2 and, you know, we determine it's, you know, related to
3 another event of use of excessive force and, you know, if
4 it's within -- and I know you've read my response letter
5 regarding where we think there should be a narrow or limited
6 time period. So if some of this information that we still
7 haven't gotten but we eventually should get leads to show
8 that the suspension had something to do with excessive force
9 and falls within that two-year period, then we're probably
10 more inclined to say that's discoverable. But at this point
11 from the information we have, it doesn't look like it's
12 discoverable in our eyes just because it happened after
13 Mr. Raymond's alleged event, and we're not even sure if it's
14 related to use of excessive force. This is information we're
15 still waiting for from DOCCS and the Labor Relations Bureau.

16 And this is probably a good point to bring this up,
17 your Honor. We were getting information, we requested
18 information from DOCCS, the Labor Relations Bureau, OSI, and
19 things were moving rather smoothly when we first started, but
20 there have been some delays in the last month or so and
21 obviously that's related to the pandemic. So I don't think
22 this is something we can't get, I think it's just a delay at
23 this point, of getting this information. So once we have a
24 further idea of what this information provides, we'll have a
25 better idea of whether, you know, we think it falls within

1 that discoverable scope.

2 MS. FREEMAN: Your Honor, this is Emma Freeman, a
3 few points in response to that. It's really not relevant
4 that Lieutenant Mitchell was suspended after he assaulted
5 Matthew Raymond. For one thing, the suspension could have
6 been based on conduct that happened before the assault, but
7 in any case, it doesn't matter whether the suspension was for
8 excessive force. What if it was for say lying to supervisors
9 or any other issue that goes to credibility? The defendant
10 is not in a position to make a determination about whether
11 that is responsive and relevant to our claims. So I'm glad
12 to hear that Mr. Mackey is working with, you know, the
13 relevant sources to obtain additional information, but we
14 would request that they be required to turn over whatever
15 information is in their possession about the suspension,
16 because no matter what the basis for it was, it impacts the
17 case and it's certainly discoverable.

18 In response to what Mr. Mackey referenced about the
19 time limitation of two years before the incident that was
20 proposed in the letter response, again, your Honor, I would
21 remind you that the first known incident, again, even before
22 discovery of assault by defendant Mitchell, is in 2002.
23 There is absolutely no basis to cabin our review of documents
24 to a two-year period that it seems to me was arbitrarily
25 cherry-picked from a handful of pro se cases that are

1 extremely different as a matter of fact than this one. We
2 didn't put a time limit on the response, we have a negligent
3 retention claim and because this man has been abusing
4 inmates, we assume, for almost as long as he's been employed
5 by DOCCS and in this case on these facts, a broad timeframe
6 is more than appropriate.

7 MR. MACKEY: Your Honor, there's --

8 THE COURT: Do we know when he started with DOCCS?

9 MR. MACKEY: Start date, I don't know offhand.
10 It's at least probably about 20 years. He retired about -- I
11 think two years ago. So it's probably early 2000, late
12 1990s.

13 MS. FREEMAN: That's my understanding.

14 MR. MACKEY: Your Honor, again --

15 THE COURT: Go ahead.

16 MR. MACKEY: Well, I just wanted to touch on a
17 couple of things. I mean there is -- obviously you've
18 reviewed the letter, but there is a lot of legal authority
19 allowing limitations of this type of discovery, one of them
20 being that only, only prior complaints related to similar
21 actions, similar complaints of use of excessive force really
22 should be the only type of prior complaints that are
23 discoverable. And then the use of a time limitation is also
24 quite common and we've cited several cases to that. Two
25 years has been used. There's a case where one year has been

1 used, there's a case that three years has been used. So
2 we're looking at a time period, you know, one, two, three
3 years, may be considered reasonable. To say they should be
4 getting documents from 2000 or 2002, we're talking about a
5 16-year span up to the date he retired. That's when we're
6 getting rather -- or we're in the unreasonable stage. You
7 know, if a claim of use of force in 2004, whether it's
8 excessive -- claimed excessive or not, really is irrelevant
9 to what happened, what allegedly happened in 2016. So I
10 think it's reasonable for both of those limitations to be
11 applied -- the time limit, and also the type of complaints
12 that may have been levied against Officer Mitchell.

13 That and, you know, I understand that, you know, to
14 go back to the request for the personnel file, I think it was
15 submitted as a blanket request and that's the basis of our
16 objection. You know, but we're still in the process of
17 reviewing personnel files for Mr. Mitchell and the other
18 defendants, and if there's information in those files that
19 are discoverable, we will turn those over. But we're not
20 just going to turn over an entire personnel file that
21 contains a lot of information that's entirely irrelevant to
22 this case.

23 And then with respect, the issue of whether these
24 documents are indexed or how they're indexed, it's pretty
25 clear, I've been in contact with DOCCS, they've informed me

1 that any request for grievances in the past that named
2 Officer Mitchell or any other defendant, these type of
3 complaints or use of force where the name Officer Mitchell
4 and the other defendants was in the document, that's not
5 indexed by officers' names, it's indexed by the name of the
6 inmate that was identified in those papers. So it would be
7 quite the burden, and again, there's case law that supports
8 this, unduly burdensome to require DOCCS to go through every
9 single use-of-force report or every single grievance that was
10 ever filed at the Auburn facility for the span of these --
11 Officer Mitchell's and the other defendants' career, and even
12 for a limited two-year period, because now we're talking
13 about tens of thousands of pages of documents that they would
14 have to go through to try to find these individuals' names.
15 And this is for information that's not even directly related
16 to the allegations of September 14th of 2016. This is all
17 just for peripheral information, which you know, is probably
18 inadmissible at the end of the day. But to go through this
19 full -- to go through, having to go through all these tens of
20 thousands of pages of documents for information that's not
21 even directly related to the case is rather burdensome and
22 unfair to my clients and DOCCS.

23 I guess the other thing was -- well, I guess that's
24 probably the main issues I wanted to hit upon.

25 THE COURT: All right. Let me broach one more

1 subject and it doesn't sound like Ms. Cowan dropped off so
2 you may be the most knowledgeable about this, but Mr. Mackey,
3 obviously you can respond to it if you know. There -- there
4 is a office or a section of DOCCS called the office of labor
5 relations, which as I understand it from prior cases
6 maintains files by employee that would include incidents of
7 prior misconduct, at least to the extent that it resulted in
8 being -- it was sustained and resulted in discipline. I
9 don't know, and if Mr. Mackey or Ms. Cowan know, I'd be
10 interested in learning whether those files from the office of
11 labor relations might include allegations against a specific
12 officer even if they did not result in discipline but
13 resulted in some sort of an investigation.

14 MR. MACKEY: That, I'm not too sure of, your Honor.
15 We have been in contact with the Labor Relations Bureau, that
16 is the office we're still waiting on some further information
17 from. From what I understand is they would have information
18 like you mentioned, your Honor, about any type of discipline
19 that was levied against an officer, any type of, you know,
20 suspension or leave, anything like that would show up in
21 these files, it's essentially the personnel files. Whether
22 that, personnel files would have information related to
23 complaints and charges that essentially went nowhere or were
24 unfounded, I'm not a hundred percent sure, but through my
25 conversations with DOCCS and the Labor Relations Bureau, I

1 would think not. I don't think that type of information
2 would be included in the files that it maintains. It really
3 would just maintain any type of documents or records related
4 to suspensions and discipline and things that were found
5 against the officer.

6 THE COURT: Ms. Cowan, if you're out there,
7 anything you want to add to that?

8 MS. COWAN: Not really, your Honor, I don't know
9 the answer to that question but I do know that it won't
10 include something like a copy of all grievances filed against
11 that officer. I know it doesn't include that. I'm not
12 entirely sure if there was some sort of investigation done
13 that resulted in no disciplinary action, I don't know if they
14 have those files or not. But I'm sure that BLR could help in
15 that regard.

16 THE COURT: All right. So I guess I was trying to
17 get a sense of whether it was like OSI or the Office of
18 Special Investigations or the IG's office that would have
19 files on cases they investigated even if the -- it was not,
20 the complaint was not sustained. So okay.

21 Ms. Freeman, anything else you need to say?

22 MS. ROSENFELD: Judge, this is Katie Rosenfeld, it
23 seems like --

24 THE COURT: Oh, I'm sorry, I'm sorry, I picked the
25 wrong name.

1 MS. ROSENFELD: No, no, you picked the right
2 name --

3 MS. FREEMAN: I'm so sorry, your Honor, I was
4 speaking on mute, and I apologize. Thank you for picking up,
5 Katie.

6 THE COURT: Okay, either of you can speak, I didn't
7 mean to single out you, Ms. Freeman, I just picked the wrong
8 name off the docket sheet.

9 MS. FREEMAN: No, I apologize and I'm sorry for
10 muting myself. I did want to say a few things specifically
11 about the use-of-force incident. You know, if Mr. Mackey is
12 going to maintain the position that the records are only
13 indexed by inmate, we I think would appreciate an affidavit
14 of recordkeeping, particularly in light of the Third
15 Department case that I mentioned suggesting that the records
16 are created for a purpose that it couldn't possibly be used
17 for if they were indexed as Mr. Mackey suggests. Certainly
18 we have no interest in, you know, asking DOCCS to burden
19 itself for no reason, but again, under the really
20 extraordinary facts of this case, we can't be deprived of
21 information about use-of-force documents relating to
22 Lieutenant Mitchell without a really good reason. And any
23 additional burden we would submit, again, is justified.

24 On the time limit, your Honor, again, the fact that
25 other more run-of-the-mill excessive force cases have used

1 one-, two-, or three-year timeframe is immaterial to this
2 case and I haven't heard anything from Mr. Mackey or anything
3 of the defendants other than a general sense of, well, I
4 don't really want to look back that far as to why we're not
5 entitled to documents in the beginning of Lieutenant
6 Mitchell's employment given that, without the benefit of
7 discovery, proffered information about seven other lawsuits
8 beginning with an incident in 2002. Those are relevant.
9 They go to a pattern which is an argument that we've been
10 making from the beginning of this case, and they are plainly
11 discoverable.

12 MR. MACKEY: Your Honor, just one quick comment.
13 The cases that we've cited does show that, you know,
14 documents or records related to a pattern are discoverable to
15 a point. They're discoverable to show a pattern and really a
16 pattern that can only be established when it's limited to a
17 short time period, so it goes back to our original argument
18 is that, you know, these type of requests are allowed, but
19 there should be a time limit to it and a reasonable time
20 limit. You know, we said two years is fair, we got that
21 number because we saw cases that said one year and we saw
22 cases that said three years, so two years is, you know, more
23 with -- well within the reason of what courts have found in
24 the past.

25 THE COURT: Okay. So let me, let me start by

1 making sure we've -- the areas of dispute that I think were
2 resolved have in fact been resolved. So did we gain somebody
3 or lose somebody there? Did somebody new sign on? Okay,
4 maybe Ms. Cowan ran for her life, I don't know. All right.

5 So as I understand it, plaintiff's medical records,
6 the use-of-force packet for the September 14th, 2016
7 incident, the chronological history display, and inmate
8 disciplinary history have already been disclosed. Am I right
9 about that?

10 MR. MACKEY: Yes.

11 THE COURT: Okay. And the defendants have now
12 agreed to produce the plaintiff's legal file and rap sheet
13 from DOCCS?

14 MR. MACKEY: Those have been produced.

15 THE COURT: Okay. So from the plaintiff's
16 perspective, are there any remaining issues with respect to
17 those documents that I just ticked through?

18 MS. FREEMAN: No, your Honor, we received a large
19 production from the defendants on the 22nd, and while I
20 haven't been able to verify that the documents are all
21 contained, I assume that they are and we can raise any issues
22 I'm sure offline if they come up but I think those documents
23 are all set.

24 THE COURT: Okay. So the next issue, the DOCCS OSI
25 investigation relating to this incident again from 9/14/2016

1 has now apparently been finalized and the defendants have
2 agreed to produce the final investigative report subject to
3 the terms of the protective order. In my experience, the
4 final investigative reports from OSI tend to be relatively
5 concise summaries, and DOCCS may not, at least at first, in
6 the first instance disclose supporting investigative
7 materials including investigative reports. So can you
8 clarify, Mr. Mackey, what DOCCS is prepared to turn over in
9 connection with this particular investigation? Are we just
10 talking about the final report or are there other supporting
11 materials that you are, or have disclosed or are going to
12 disclose?

13 MR. MACKEY: What we received from the OSI was
14 their final investigative report which was, which had
15 attached to it, you know, the underlying documents, use of
16 force related to this incident and inmate misbehavior report
17 related to this incident, any memos prepared at the Auburn
18 facility related to that incident. And that's what we turned
19 over. We haven't, and I can double check this, but I don't
20 believe we withheld anything that we got from OSI. We
21 essentially turned over to plaintiff what we got from OSI
22 which was the final investigative report.

23 THE COURT: But not necessarily witness interviews?

24 MR. MACKEY: That -- no, there was no witness
25 interviews related to the report. But we didn't get it. We

1 didn't receive anything like that.

2 THE COURT: Okay. All right. So I mean, I think
3 it is a good starting point for the plaintiffs to see the
4 final report. That may trigger follow-up requests for
5 supporting information, and while I'm certainly not going to
6 prejudge this, I might -- it would be reasonable to expect
7 that I might eventually order disclosure of reports of
8 interviews to the extent they relate to the named parties in
9 this action to the extent they exist, and I know, you know,
10 to a certain extent, the use-of-force reports, you know, are
11 maybe what OSI relies upon but I think in some instances they
12 go back and re-interview witnesses and typically the results
13 of that will be summarized in the final investigative report
14 but not necessarily. So, you know, again, I'll let the
15 plaintiffs review the report and, you know, to the extent
16 there are follow-up requests that you can't work out with
17 counsel and with DOCCS, then I can get -- I can get back
18 involved, but again, you know, to the extent there may be
19 interview reports of the named parties, I think that might
20 be -- that might be fair game as well to the extent they
21 exist and haven't been turned over.

22 The other thing I would mention is that it is not
23 uncommon for DOCCS to redact certain information from an
24 investigative report such as the names of other inmates who
25 might have provided information or might have been witnesses.

1 That can interfere with a plaintiff's efforts to identify
2 potential nonparty witnesses or inmate witnesses, and so that
3 may be a subject of some further discussions, and you know,
4 while I, while I think, you know, I think there are issues of
5 inmate privacy and institutional security that provide some
6 basis for redactions, you know, to the extent the materials
7 suggest a real promising potential witness, we can discuss
8 whether that witness name or that inmate name needs to be
9 disclosed.

10 The plaintiffs have also asked for the results of
11 any investigation by the Department of Justice with respect
12 to the September 14th, 2016 incident, and the defendants
13 assert that they are not in possession or control of such
14 documents so I guess I need to ask Mr. Mackey, does that just
15 mean you didn't get one from DOCCS or does that mean there
16 isn't one or that DOCCS doesn't have one?

17 MR. MACKEY: We did not receive anything from DOCCS
18 regarding a Department of Justice investigation. Whether one
19 exists or not, I couldn't tell you either way, your Honor.

20 THE COURT: Okay. Well, I have, again, a recent
21 experience with another OSI investigation at Auburn for which
22 there was a parallel Department of Justice investigation and
23 there was a separate OSI final investigative report on the
24 Department of Justice investigation. So I think, Mr. Mackey,
25 it is worth inquiring. I don't know, Ms. Rosenfeld or

1 Ms. Freeman, whether you have some concrete information that
2 there was a parallel investigation or not involving the feds?

3 MS. FREEMAN: We do, that's our understanding, your
4 Honor. Obviously we don't know much more than that, but we
5 made the request not as a, you know, fishing expedition but
6 because we have a basis to think there was a parallel
7 investigation, yes.

8 THE COURT: The case I worked on involved a
9 particular correction officer who was accused of planting
10 weapons on inmates and it's a case Ms. Cowan handled and as I
11 say, there were two investigative reports so I think,
12 Mr. Mackey, you may need to follow up with OSI and inquire
13 whether there was a separate investigation, whether it was a
14 joint investigation with OSI and whether there's a report
15 from that, just so that we can, you know, address whether
16 there's something in that that is fairly discoverable.

17 MR. MACKEY: I can do that, your Honor.

18 THE COURT: All right. So then from plaintiff's
19 perspective, you know, with those kind of open-ended issues
20 there, is there anything else we need to talk about in terms
21 of the OSI documents?

22 MS. FREEMAN: No, your Honor, I think your approach
23 is the right one, that we will certainly raise any issues
24 with defendants in the first instance once we've had a look
25 at the final report that was produced.

1 THE COURT: Okay. And I -- Jodi's probably got
2 your name or your voices by now, but that was Ms. Freeman,
3 yes?

4 MS. FREEMAN: Yes, I apologize, your Honor.

5 THE COURT: All right. So the primary area of
6 dispute involves the discoverability of personnel and
7 disciplinary documents relating to the named defendants. Let
8 me start by briefly putting a little bit of the applicable
9 law on the record here since I'm going to rely on the record
10 of this proceeding rather than write on it.

11 As with any discovery issue, I think the extent to
12 which personnel and disciplinary records of law enforcement
13 and correctional personnel are discoverable, turns largely on
14 the concept of proportionality, which requires the court to
15 balance the importance of the discovery in resolving material
16 issues in the litigation against the burden or expense of
17 production. That standard, of course, is established in
18 Federal Rule of Civil Procedure 26(b)(1). The New York Civil
19 Rights Law Section 50-a establishes certain limitations on
20 the disclosure of confidential law enforcement personnel
21 records under state law. While the federal cases indicate
22 that that privilege is entitled to some consideration in
23 connection with discovery issues in civil rights cases, it
24 is -- the New York privilege is not controlling in federal
25 civil rights actions. That's established by, among other

1 cases, *Mercado v. Division of New York State Police*, 989
2 F.Supp. 521 at 522, a Southern District of New York case from
3 1998.

4 I'm quoting from now from another case, "In a civil
5 rights action against the police, police internal
6 investigations files are discoverable when they involve
7 allegations of similar misconduct. It is 'the prevailing
8 practice' of courts in the Second Circuit 'to limit discovery
9 of a defendant's disciplinary history to complaints, whether
10 substantiated or not, about conduct similar to the conduct
11 alleged in the complaint.'" That's from *Session v.*
12 *Rodriguez*, a District of Connecticut case from June 4, 2008,
13 reported at 2008 WL 2338123, at *2, which in turn cites other
14 authorities including *Gibbs v. City of New York*, Eastern
15 District of New York case from February 4th, 2008, which in
16 turn collects other cases.

17 I would also reference a case I think cited in this
18 case, *Simcoe v. Gray*, 2012 WL 104 -- 1044505, at *3, a
19 Western District of New York case from March 28th, 2012,
20 which held, and I'm quoting, "Prior complaints made against
21 the defendants, whether substantiated or not, are
22 discoverable in Section 1983 civil rights actions so long as
23 the complaints are similar to the constitutional violations
24 alleged in the complaint or are relevant to the defendant's
25 truth or veracity."

1 The claim in this civil rights case is one of
2 excessive force, and the issue is whether the defendants'
3 conduct here also blends into issues of sexual harassment or
4 bullying, and plaintiff's counsel has illuminated that a
5 little bit for me in terms of discussing some of the prior
6 incidents here. So you know, while I buy into the line of
7 authority which says that you shouldn't necessarily open
8 discovery to all sorts of prior misconduct if they're
9 unrelated to the constitutional violations alleged in the
10 particular action, I recognize the need to consider
11 broadening the category a little bit, and I'll get specific
12 in a little bit.

13 There seems to be extensive documentation of at
14 least defendant Mitchell's prior alleged involvement both in
15 excessive force issues and sexual harassment issues from a
16 number of lawsuits. I think plaintiff's counsel has
17 emphasized that but I think that kind of cuts both ways in
18 the sense of, you know, proportionality I think allows me to
19 consider whether there is ample evidence already available to
20 one side to support their position that there's been a
21 pattern of misconduct which might, you know, argue for not
22 necessarily going back as far to pile on with other incidents
23 that perhaps were less compelling and did not result in
24 lawsuits or investigations or discipline. But you know, I do
25 think I need to draw a bracket around the types of misconduct

1 involved based on the issues of proportionality so we don't
2 get too far afield and, at least with respect to defendant
3 Mitchell, there seems to be a lot of material available for
4 plaintiff's counsel to work with.

5 I think, I take Mr. Mackey's point that there is a
6 lot of material in personnel records which are not
7 particularly relevant to the particular misconduct alleged in
8 this case or the credibility of the employee, and that many
9 personnel records are sensitive and confidential. I do,
10 however, see some reason to consider disclosure of
11 performance appraisal forms, you know, particularly in light
12 of the fact that there is, you know, there is a claim of
13 negligent supervision or retention at least with respect to
14 defendant Mitchell.

15 And the -- with respect to his suspension, as I
16 will discuss in a minute, the fact that it happened after
17 this incident I don't think is controlling but there may be
18 some further investigation required to get into whether or
19 not the suspension was sufficiently related, or the
20 misconduct leading to the suspension was significantly
21 related to the alleged misconduct or constitutional
22 violations in this case.

23 The burden of production of records that might
24 relate to the unreasonable use of force against inmates or
25 sexual harassment involving inmates is going to vary with the

1 type of records. As defendants point out and as I think I
2 understand from handling prior discovery disputes in DOCCS
3 cases, use-of-force reports and inmate grievances are not
4 filed or indexed by the officer involved but by inmate so
5 trying to find records that relate only to a particular
6 officer is extremely time consuming and burdensome for DOCCS.
7 I think there are cases, particularly from the Western
8 District of New York, that say that DOCCS cannot avoid the
9 discovery of relevant grievances and use-of-force reports
10 based on self-imposed logistical burdens in finding and
11 producing such documents relating to a particular officer.
12 But there are other cases, including some cited in the
13 defense brief at page 3, that have not ignored the burden
14 that DOCCS would face from searching records systems geared
15 toward management of its inmates for information about a
16 particular DOCCS employee. And you know, again, plaintiffs
17 have raised some issues as to whether sort of the common
18 understanding of what is and isn't readily available from the
19 records of grievances and use-of-force reports may be
20 something that we need to confirm, but I do, you know, think
21 I have to consider the burden of production in making the
22 proportionality analysis.

23 I do think there are more readily available sources
24 of documents that will tend to be more probative of whether a
25 DOCCS employee has engaged in a pattern of similar misconduct

1 in the past. One source that we've mentioned would be the
2 files of the DOCCS Office of Special Investigations or OSI
3 which was formerly called the Inspector General's office or
4 the IG. While the vast majority of inmate grievances are
5 found to be without merit and are unlikely to produce useful
6 evidence, an incident that has escalated to an OSI or an IG
7 investigation I think is much more likely to have merit and
8 to be relevant in trying to establish pattern evidence under
9 Rule of Evidence 404(b). Also, the DOCCS office of labor
10 relations, which we've also discussed, maintains files by
11 employees which would reflect any discipline imposed on a
12 correctional officer based on sustained allegations of
13 misconduct, and may also contain complaints of misconduct
14 that did not ultimately result in the imposition of
15 discipline but were considered and investigated, although
16 that is a little unclear.

17 So I am going to order the defendants, with the
18 cooperation of DOCCS, to produce the following categories of
19 documents for each named defendant during a timeframe which I
20 will discuss in a minute.

21 The first would be any reports or other records
22 relating to allegations involving the use of excessive or
23 unreasonable force or sexual harassments involving inmates,
24 and I'm emphasizing that to say I'm -- I've concluded that
25 sexual harassments of coemployees is going to be a different

1 kettle of fish that is less relevant that I'm not ordering
2 produced.

3 And the second category of documents would involve
4 making false claims or allegations or providing false
5 statements or testimony. And all -- both categories of
6 records to the extent they are maintained in the files of the
7 DOCCS office of labor relations for that defendant.

8 Now, as I say, it may be that such records will not
9 be found in the office of labor relations files unless the
10 allegations were determined to be founded and resulted in
11 discipline; however, records relating to any such allegations
12 that are maintained in the office of the files of -- I'm
13 sorry, in the files of the office of labor relations should
14 be disclosed even if the allegations were ultimately not
15 found to be substantiated. The fact that the allegations
16 resulted in a disciplinary investigation of the officer would
17 make it sufficiently relevant to be discoverable. Also the
18 plaintiffs should, for each named defendant, be provided with
19 any reports or other records of any investigations by DOCCS,
20 OSI, or IG relating to the incident on September 14th, 2016,
21 which has already been produced. But also any other
22 investigation of claims, again, involving the use of
23 excessive or unreasonable force or sexual harassment on
24 inmates and/or making false claims or allegations or
25 providing false statements or testimony. These records

1 should be disclosed whether or not the OSI or IG ultimately
2 determined whether the allegations were substantiated.

3 Finally, the defendants shall produce in discovery
4 any personnel or disciplinary records to the extent that
5 defendants are going to rely on them in defending this
6 action.

7 So now DOCCS will be given some leeway, at least
8 initially, in redacting limited information from any such
9 documents that raise privacy or security concerns, and again,
10 I think I suggested that earlier this primarily relates to
11 the names of other inmates, but plaintiff's counsel may later
12 address any concerns about such redactions if, for example,
13 it prevents access to a promising potential inmate witness.

14 With respect to timeframe, defense counsel cites
15 several cases which reflect the fact that applying the rule
16 of proportionality in discovery often results in limiting the
17 timeframe for which discovery of evidence or other misconduct
18 or constitutional violations is limited.

19 In the case of defendant Mitchell, because he is
20 the primary alleged wrongdoer and appears to have an alarming
21 disciplinary history, I am going to make that timeframe
22 broader for him than I am for the other defendants for which
23 there does not seem to be such evidence of prior misconduct.
24 I would note that, contrary to defense counsel's brief, there
25 is case authority for the proposition that similar misconduct

1 after an alleged civil rights violation may be sufficiently
2 relevant to be discoverable. For that I would cite *Barrett*
3 *v. City of New York*, Eastern District of New York case from
4 2006, reported at 237 F.R.D. 39 at 41, which held that
5 documents and information relating to investigations that
6 postdate the filing of the current action could be relevant
7 in the civil rights case and should be disclosed. Similar
8 holding in *Wisniewski v. Claflin*, Eastern District of
9 New York case from April 16, 2007, reported at 2007 WL
10 1120464, at *3. So for defendant Mitchell, I'm going to
11 order production of the categories of documents that I've
12 previously discussed from the beginning of 2014 through the
13 end of 2017, a period of four years. And again, in light
14 of -- you know, I understand that the lawsuit suggests the
15 the pattern of conduct going back further, and I think based
16 on the volume of evidence that the plaintiff's counsel has
17 from the litigation, the prior lawsuits, a four-year period
18 bracketing the incident here should provide ample evidence of
19 pattern evidence. I'm not ruling out consideration of
20 expanding that period after they've reviewed what they get
21 for that four-year period on top of what they find in the
22 records of litigation, but I think that that is, under the
23 principles of proportionality, a reasonable timeframe.

24 For the other named defendants who, again, there
25 seems to be less of a track record of prior misconduct,

1 relevant misconduct, I will narrow the timeframe from
2 September 2014 through and including September 2017, a period
3 of three years bracketing the incident.

4 All right, does anybody need any clarification or
5 have any questions with respect to my rulings with respect to
6 the personnel and disciplinary records before we move on?

7 MS. FREEMAN: Your Honor, this is --

8 MR. MACKEY: Your Honor -- go ahead.

9 MS. FREEMAN: Thank you, Pat. This is Emma Freeman
10 for the plaintiff. I did want to clarify whether your ruling
11 with respect to disciplinary records includes
12 suspension-related documents that I understand Mr. Mackey is
13 still in the process of obtaining.

14 THE COURT: Yeah, so I guess the one thing I will
15 say about that is I think if the suspension implicates the
16 categories of prior misconduct that I've outlined both on
17 unreasonable and excessive force and sexual harassment of
18 inmates, that information should be disclosed even if it was
19 more than -- if it was after the end of 2017. So that I
20 would probably, the only change I would make with respect to
21 that would be to expand the period for the evidence of the
22 reasons for suspension beyond 2017, if they involve
23 sufficiently similar types of misconduct, and I would do that
24 because I think it would be relevant to DOCCS' failure to
25 suspend or terminate defendant Mitchell earlier if the

1 ultimate grounds for the suspension were similar to prior
2 incidents of misconduct that occurred. So that's a good
3 question, and it does -- did warrant a little clarification.

4 MS. FREEMAN: Thank you, your Honor. Just one
5 follow-up. You just listed again excessive and unreasonable
6 force and sexual harassment. If the suspension were related
7 to the other category you listed, false claims or false
8 testimony, would that also be produced?

9 THE COURT: Yes, correct.

10 MS. FREEMAN: Thank you, your Honor.

11 THE COURT: All right. Mr. Mackey?

12 MR. MACKEY: Your Honor, I did have a quick
13 question. Could you clarify the period of time for Officer
14 Mitchell, what was the dates again?

15 THE COURT: Beginning of 2014 to the end of 2017.
16 So four years.

17 MR. MACKEY: Okay, that's what I wrote down, okay,
18 thank you.

19 THE COURT: All right. Okay. So the one remaining
20 area of dispute if I've got my information straight relates
21 to the request for information about the location of
22 stationary cameras in various areas of the Auburn facility,
23 including the medical unit, infirmary corridors, and the SHU.
24 Is that still a bone of contention between the parties or
25 have you worked that out as well?

1 MR. MACKEY: Your Honor, we haven't had any
2 discussions regarding that since we submitted the letter so I
3 believe, without putting words in Emma's mouth, that is still
4 an issue.

5 MS. FREEMAN: It is still an issue, your Honor, but
6 it might be helpful if I could say a word or two, because we
7 are happy to narrow the request somewhat. We don't need to
8 pursue information about the location of cameras anywhere
9 throughout the facility. But in their recent production,
10 defendants did give us a video which I haven't yet received
11 for technological reasons that I understand shows plaintiff
12 being escorted back to the Auburn facility from his time at
13 the Auburn Community Hospital and I know that Pat will
14 correct me if that's an inaccurate statement. And so in
15 light of the fact that that video from September of 2016 was
16 preserved and has appropriately been produced, the
17 information that we really need about videos and video
18 cameras is the presence or absence of a camera in the room
19 where the assault occurred, and the presence or absence of
20 cameras in the hallway immediately outside of that room. So
21 we, insofar as the defendants don't agree to produce that
22 information and certainly any video if it exists, then we
23 still do have a dispute, but we are happy to narrow the
24 request to just those two areas.

25 THE COURT: All right. That sounds pretty close,

1 Mr. Mackey, to what you were at least willing to explore if
2 I'm correct.

3 MR. MACKEY: What -- I guess what our main concern
4 was that, and maybe this has been alleviated by what
5 Ms. Freeman just said, was essentially providing a layout of
6 where all the cameras are and where they aren't, because then
7 we're basically giving the blueprints of the facility
8 security wise and obviously that would cause a major issue,
9 security issue within the facility. I'm not even sure what
10 the issue of location, whether there were cameras in the --
11 well, let me back up. One is, my clients don't even -- there
12 wasn't even any type of use of force that even led to a
13 preparing of a use-of-force document, so for them, this use
14 of force that Mr. Raymond is claiming happened is fiction, it
15 never really happened, so I'm not quite sure what room
16 Ms. Freeman may be referring to or what hallways Ms. Freeman
17 may be referring to because there was no event that happened
18 once Mr. Raymond returned to the Auburn facility. So I guess
19 that kind of muddies up the issue because we don't even know
20 what room they may be referring to.

21 THE COURT: I think they're talking about, I think
22 it was described as the medical unit emergency treatment
23 room, which is where he alleges he was assaulted, and I think
24 Ms. Freeman has added to that the, I would say the immediate
25 adjacent corridors, and I, I think she's basically asking,

1 you know, absence or presence of cameras in those areas, and
2 I think the understanding is there probably weren't any.

3 MR. MACKEY: Well, I guess maybe the way to cut to
4 the chase, your Honor, is that we can ask DOCCS if there's
5 any footage from that particular day of those locations. I
6 don't think we really need to get into documentation of
7 whether cameras exist there or not, but we --

8 THE COURT: I don't think we're talking -- we're
9 talking about back in 2016, which presumably wouldn't
10 necessarily tell you where they are now, so it seems to me a
11 reasonable request for DOCCS, and this can be through
12 witnesses I suppose if the defendants know this but they may
13 not, but you know, basically, they're looking for the answer,
14 was there camera coverage in the medical unit emergency
15 treatment room in September 2016 or in the immediate adjacent
16 corridors. Yes or no.

17 MS. FREEMAN: That's correct, your Honor, as to the
18 framing of the question, and I just add that the final OSI
19 investigation report that was just produced to us makes clear
20 that Mr. Raymond was taken to the medical wing of Auburn when
21 he returned from the hospital. So I understand Mr. Mackey
22 and his clients' position that there was no use of force, but
23 certainly we are entitled to know not just whether or not
24 there were cameras, but if there were, whether there is
25 actually camera footage, even if it's no longer been

1 preserved for whatever reason.

2 THE COURT: Yeah, I mean I -- I think that is
3 something that would typically be ordered in an excessive
4 force case. You know, I get the security concerns about a
5 map of where everything is in the facility, I think where
6 they put cameras has evolved over time so whether there were
7 or were not cameras now three-and-a-half years ago I don't
8 think really raises a serious security concern. And I would
9 almost bet that even if there were cameras, there's not going
10 to be any footage around unless there was some preservation
11 request. I would say that the escort videos are typically a
12 handheld camera and my sense is that the preservation of
13 those and the preservation of stationary video cameras are
14 kind of a whole different critter. But all right. So, and
15 I -- and again, I don't know where you're, who you're going
16 to get that from, that might end up being an affidavit from
17 the assistant superintendent for security or something like
18 that, but I think that's, that's what you need to produce.

19 And I guess the other loose end that I forgot about
20 is Ms. Freeman I think requested a confirmation about the
21 lack of cross-referencing of use-of-force reports and
22 grievances by DOCCS employee, which as I say, is the common
23 understanding of people who handle these types of cases, but
24 she's found information to suggest maybe that's not the case.
25 My guess, Ms. Freeman, is what they're suggesting is, you

1 know, to the extent it ends up in the office of labor
2 relations files, it might be -- it might be by officer but I
3 think that's another area where some sort of an affidavit
4 from, if not a party, somebody at DOCCS would be appropriate.
5 And I get, you know, Mr. Mackey, that you are not an AG and
6 that complicates coordination with DOCCS but it sounds like
7 you've actually managed to get a foothold into that
8 bureaucracy, so usually when you have an order from me, that
9 will help you get what you need.

10 MS. ROSENFELD: Your Honor -- oh, I'm sorry, I
11 didn't mean to interrupt you, this is Katie Rosenfeld, just
12 had one more thing I wanted to ask but I didn't mean to
13 interrupt you.

14 THE COURT: No, I'm done, go ahead.

15 MS. ROSENFELD: Okay. So at the risk of trying
16 your Honor's patience, I just, while you were speaking I just
17 wanted to go back to one item in your earlier ruling about
18 the production limits. You know, I certainly understand the
19 court's decision about the timeframe for Lieutenant Mitchell
20 being four years and for the others being three years and the
21 kind of trying to, you know, appropriately allocate burden in
22 terms of proportionality. I wanted to ask the court if you
23 might make an exception with respect to timeframe to two --
24 two known incidents that are outside of that timeframe but
25 for whom, because we know the name of the inmate involved,

1 there would be no burden associated with the production of
2 the OSI files or the BLS files relating to those two, and
3 those would be Dino Caroselli from 2002 who was paid \$55,000
4 for an assault involving broken hand, ankles, teeth, loose
5 teeth and a nose, and then in 2008, Richie Thomas who alleged
6 that Lieutenant Mitchell assaulted him while he was
7 handcuffed just as Mr. Raymond's assault and was paid \$20,000
8 to settle his case. So those two files are outside the
9 timeframe that your Honor referenced, but as your Honor
10 noted, OSI files may sometimes contain summaries or other
11 information related to that person, and so by pulling two
12 more files that are outside that time period based on those
13 two specific people, I think it could be very fruitful for us
14 with relatively little additional burden to the defendants.

15 THE COURT: So you're looking for the OSI
16 investigation reports for those two?

17 MS. ROSENFELD: Exactly, your Honor.

18 THE COURT: What do you have from the litigation
19 with respect to those two incidents?

20 MS. ROSENFELD: Just the complaint, your Honor.

21 THE COURT: And then it settled?

22 MS. ROSENFELD: Correct.

23 MR. MACKEY: Your Honor, I guess I would just go
24 back to the argument that we're talking about 2002 and 2008,
25 and if plaintiff is looking to develop a pattern of behavior,

1 a pattern is usually, as the courts have ruled in numerous
2 cases, the pattern's usually what happens within a relatively
3 small time period and you know, we've discussed one year, two
4 year, three year. But if we're talking about 2002 which is
5 16 -- 14 years before the alleged event and 2008 which is
6 eight years before the alleged event, I don't really think
7 that lends or leads towards establishing a pattern and I
8 think it just -- it's a little too far back, at least with
9 the 2002 case, way far back, in that it's beyond what is
10 usually done by the courts in allowing certain
11 discoverable -- documents to be discoverable when it's
12 closely related in time lines.

13 MS. ROSENFELD: And I appreciate that and the
14 reason that I raise it, your Honor and Mr. Mackey, is that
15 there are both issues of negligent retention and with the
16 superintendent of the facility having very long-standing
17 knowledge of Mr. Mitchell's problems, including these two
18 specific incidents, and then balancing the issue of burden in
19 retrieving and locating things. And so I think where OSI is
20 already going to be asked to do a search for these four
21 years, giving them the two additional names of these very
22 specific incidents and asking for two more files is really
23 not burdensome, but again, these files may contain
24 information and are likely to contain information regarding
25 who at the facility even back then, which may include

1 Superintendent Graham, was aware of these incidents and knew
2 about them, and also additional information about Lieutenant
3 Mitchell therein.

4 THE COURT: Okay.

5 MR. MACKEY: Burdensome argument, your Honor, it's
6 also a relevance argument just because of the great span of
7 time.

8 THE COURT: Right, and I guess what I'm going to do
9 is I'm going to punt on that request and let's see what the
10 discovery I've ordered produces to you in terms of a pattern
11 and if, you know, if you conclude that there's some serious
12 hole in that that one or more of these cases would fill, then
13 I'll consider that. I mean, you know, part of the issue of
14 proportionality is providing you with a reasonable
15 opportunity to develop the available evidence to, you know,
16 to make your case, and seems to me you're going to have
17 plenty, but after you've collected what I've ordered, I won't
18 preclude you from coming back and raising that issue again.

19 MS. ROSENFELD: Thank you, your Honor, we'll do as
20 you advise of course. Thank you.

21 THE COURT: All right. So are there any
22 outstanding discovery issues that I have missed?

23 MS. FREEMAN: Not from plaintiff's end, your Honor,
24 this is Emma Freeman.

25 MR. MACKEY: I don't believe so, your Honor.

1 THE COURT: All right, so Mr. Mackey, it sounds
2 like it's a little unclear to you how long it's going to take
3 you to produce this stuff and I understand you're somewhat at
4 the mercy of DOCCS who is right now somewhat at the mercy of
5 an epidemic.

6 MR. MACKEY: Right.

7 THE COURT: So I think the thing to do is to give
8 you a couple three weeks to get back in touch with your
9 client and communicate what I've ordered and get a ballpark
10 from them as to timeframe and then we can revise the
11 schedule. Right now the fact discovery deadline is going to
12 be expiring on August 10th and seems pretty clear that's
13 going to need to be extended but seems to make sense to give
14 you a couple three weeks to, you know, get a better sense of
15 what you can accomplish and in what timeframe before we bump
16 out the schedule. And then -- go ahead.

17 MR. MACKEY: I was going to say, your Honor, I will
18 definitely contact my contact person at DOCCS who has been
19 essentially the middleman between my communications with the
20 Labor Relations Bureau and OSI. It's tough to get from them
21 a response as to how long it will take but I'll let them know
22 that you specifically mentioned that and maybe that helps in
23 getting them to give me more of a concrete answer as to when
24 I can expect to get these documents. I mentioned earlier
25 that we're still waiting on a few and it's probably been

1 close to a month already since we initially asked for them
2 so -- probably more than that, actually, now we're in June,
3 but I'll try my best to, you know, lean on them to get it to
4 us as soon as they can.

5 THE COURT: Okay. And what -- so what I will do is
6 I will put my specific rulings in an order and that will give
7 you something to flash in front of DOCCS, hopefully will help
8 you get their attention. I'll look for a status report from
9 you by June 25th, and you know, whatever -- wherever you are
10 at that point, let me know and if -- to the extent you've got
11 enough information that the parties can agree to an extension
12 of the schedule, you can put a proposed schedule in the
13 status report.

14 MR. MACKEY: Okay.

15 THE COURT: All right. Is there anything else we
16 need to discuss this afternoon?

17 MS. FREEMAN: Not from plaintiffs, your Honor.

18 MR. MACKEY: I don't believe so.

19 THE COURT: Ms. Buth, anything from you?

20 (No response.)

21 THE COURT: Oh, she may be the one who signed off.
22 Okay. All right. So we'll look for that status report on
23 June 25th and we'll go from there in terms of revising the
24 schedule and perhaps setting up a follow-up conference. All
25 right. Everybody --

1 MR. MACKEY: Your Honor.

2 THE COURT: Yes.

3 MR. MACKEY: One quick question. Like you said, it
4 would be helpful for me to flash an order requiring the
5 disclosure of the documents you mentioned earlier, it would
6 help me in getting the documents from DOCCS and OSI and Labor
7 Relations Bureau. When do you think that order would become
8 available for me to use to get the process moving?

9 THE COURT: Tomorrow at the latest.

10 MR. MACKEY: Okay. That will work.

11 THE COURT: Okay? Okay. All right. Thanks,
12 everybody.

13 (Proceedings Adjourned, 3:12 p.m.)

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/S/ JODI L. HIBBARD
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